Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

80-884

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

Leszek Syski

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

Joseph G. Hitselberger
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December 1, 1980

QUESTION PRESENTED

Does a trial court by refusing to allow a jury to hear evidence that an accused trespasser acted to prevent a feloneous abortion violate the Sixth Amendment right to a jury trial and the Fourteenth Amendment due process clause of the United States Constitution?

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IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

No.

LESZEK SYSKI

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

Petitioner Leszek Syski, an alleged trespasser at an abortion clinic, asks a writ of certiorari be issued to review a judgment of the Supreme Court of Virginia

refusing to review the failure of the trial court to allow a jury, charges with sentencing, to hear evidence in excusing or mitigating his actions in violation of the Sixth Amendment right to a jury trial and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

OPINIONS BELOW

No opinions were written by either the trial court or the Supreme Court of Virginia.

JURISDICTION

Leszek Syski was convicted of criminal trespass in the Circuit Court of the City of Alexandria, Virginia, on April 1, 1980. The order of the Supreme Court of Virginia refusing the Petition for Appeal was entered October 1, 1980 (p. 1; App.). This

Court has jurisdiction under 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution Amendment VI.

United States Constitution Amendment XIV, Section 1.

1950 Code of Virginia, as amended:

18.2-119, Trespass after having been forbidden to do so;

18.2-11, Punishment for conviction of misdemeanor;

18.2-71, Producing abortion or miscarriage, etc., penalty;

18.2-72, When abortion lawful during first trimester of preganancy;

18.2-76, Informed consent required;

19.2-295, Ascertainment of punishment.

STATEMENT OF CLAIM

The Alexandria Womens Clinic is an abortion clinic performing first trimester abortions which have resulted in the deaths of thousands of unborn babies in Virginia.

Such clinics came into being following this courts decision in Roe v Wade, 410 U.S. 113, 93 S.Ct.705, 35 L.Ed. 2d 141 (1973). That case held that prior to approximately the end of the first trimester the abortion decision and its effecuation must be left to the medical judgment of the pregnant woman's attending physician in consultation with the patient.

In compliance with that holding the Virginia Legislature amended its feloneous abortion statutes so that a first trimester abortion is not feloneous

provided there is a physician-patient consultation prior to the abortion.

Knowing that women seeking an abortion were not informed by a physician as required, Syski participated in a sit-in at the Alexandria Womens Center on September 15, 1979. He was asked to leave by the person in charge, refused, and was arrested. He was convicted of trespass and fined $500.00 by a jury in the Circuit Court of Alexandria, Virginia.

In Virginia the function of a criminal jury is twofold. A jury both determines guilt and fixes punishment. (§19.2-295, Code of Virginia).

In Virginia trespass is a misdemeanor with a maximum sentence of one year in jail and $1,000 fine. (§18.2-11, Code of Virginia).

Prior to the trial, the prosecution

made a motion to exclude defendants evidence. The court took the motion under advisement until trial (see appendix pg. 5a-11a).

At the jury trial in the Alexandria Circuit Court, Syski attempted to introduce evidence that he went to the abortion clinic to protest and, if possible, prevent feloneous abortions from taking place that day.

In connection with the proffer, but out of the presence of the jury, testimony was elicited from Janet Paritzky, an employee of the Alexandria Women's Clinic that unlawful abortions were being preformed at the abortion clinic. The physicians did not inform the patients of the abortion risks, as required by Virginia law.

The Court agreed that the proffered

evidence would show that the abortions were feloneous under Virginia law. The Court said:

> "THE COURT: I think you have shown through the testimony of this witness Mr. Hitselberger, that the abortions that were being performed were not in accordance with the section 18. 2-76 and that the physician in all instances did not inform the pregnant woman of the nature of the proposed procedure and the risks in her particular case to her health in terminating or continuing her pregnancy. But the ruling of the Court is the same." (pp. 83-84, Trial testimony).

The Court's ruling was that the jury could not hear Janet Paritzky.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the right of trial by jury and the body of law that has grown up around the court's application of the due process clause

It is important that the decision of the Circuit Court of the City of Alexnadria and the Virginia Court of Appeals be reviewed and reversed so that both physicianand and lower court judges will realize that a woman's right to abortion is not absolute, even in the first trimester. Debate over the right of a state to require what is mandated by Roe v Wade, supra, should not be clouded when there is no such question. Roe v Wade specifically provides for physician-patient consultation in the case of an abortion.

> "This means, on the other hand, that, for the period of pregnancy

> prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State." (Emphasis added) 410 U.S. 113, 164.

The Virginia statutory scheme first makes all abortions unlawful (i.e. felonious) except as otherwise provided (§18.2-71, Code of Virginia). Abortions are lawful in the first trimester only when performed by a physician (§18.2-72, Code of Virginia) and only when the physician has informed the pregnant woman of the nature of the proposed procedure to be utilized and the risks, if any, in her particular case to her health in terminating or continuing the pregnancy. (§18.2-76, Code of Virginia).

The jury should have been allowed to hear evidence that Syski was at the Alexandria clinic in an effort to prevent feloneous abortions. Such evidence would have excused Syski or at least mitigated his punishment.

In Brady v Maryland 83 S.Ct. 1194, 373 U.S.83, 10 L.ED. 2d 215, this Court upheld the right to call for and present evidence in an accused's favor when such evidence is material to either guilt or to punishment.

The Court held that the suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment.

The Court's rationale was that the withholding of evidence which would tend to exculpate the accused or reduce the

penalty helps shape a trial that bears heavily on the defendant.

It would be unrealistic to conclude that evidence of Syski's intent in trespassing would not have affected the jury's verdict pursuant to 18.2-119.

Certainly in an analogous situation, this Court felt the reason for a trespass was important. In Boynton V. Virginia 81 SCt. 182, 364 U.S. 454,81 SCt. 454, 5 L.Ed 2d 206, this Court granted review to a Negro who was convicted of trespass for protesting discrimination at a bus terminal. The Court reversed Boynton's conviction because the Interstate Commerce Act forbade discrimination. Discrimination being unlawful, Boynton's presence was therefore under "authority of law."

Syski's presence at the clinic was similarly "excused" because he was on the clinic's premises attempting to prevent a felony.

The defense of excuse, or justification, was therefore denied the jury's consideration.

Equally denied to the jury were facts in mitigation of punishment. Under Virginia law, the jury both tries the facts and ascertains punishment (§19.2-295, Code of Virginia).

Having been precluded from presenting his defense and showing mitigating circumstances, Syski was deprived of a jury trial required by the Sixth Amendment to the U.S. Constitution. The jury, by the trial court's ruling, was effectively prevented from hearing all but those facts which were conceded by the defendant

in opening statement i.e., Syski had gone on the premises, he was told to leave and he refused. The jury thus performed no function except to impose sentencing. This is not due precess envisioned by the Fourteenth Amendment.

CONCLUSION

The Court excluded evidence which prevented defendant from having either his defense or extenuating circumstances passed upon by a jury. The Court felt both matters were precluded by Roe v Wade as irrelevant.

However, even though a state may not interfere in the abortion decision, there must in fact by such a decision between physician and patient. Further guidance should be given lower courts as to this aspect of Roe v Wade.

The case should be remanded for a new trial, at which time the jury should be allowed to consider the feloneous abortion procedure at the Alexandria Women's Clinic.

Respectfully submitted,

Joseph G. Hitselberger
2060 North 14th Street
Arlington, Virginia 22201
(703) 524-2888

Counsel for Petitioner

December 1, 1980

APPENDIX A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday, the 1st day of October, 1980.

Leszek Stefan Michal Syski, Appellant,

against Record No. 800988
Circuit Court No. M-4789

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Alexandria

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:
Allen L. Lucy, Clerk

By: /s/ (illegible)
Deputy Clerk

APPENDIX B

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, * * * "

United States Constitution, Amendment XIV, Section 1:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 18.2-119, 1950 Code of Virginia, as amended:

> "Trespass after having been forbidden to do so. - If any person shall without authority of law go upon or remain upon the lands, buildings or premises of another, or any part, portion or area thereof, after been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof, or after been forbidden to do so by a sign or signs posted on such lands, buildings, premises or part, portion of area thereof at a place or places where it or they may be reasonably seen, he shall be guilty of a Class 1 misdemeanor. * * * "

Section 18.2-11, 1950 Code of Virginia, as amended:

"Punishment for conviction of misdemeanor. - The authorized punishments for conviction of a misdemeanor are:

(a) For Class 1 misdemeanors, confinement in jail for not more than twelve months and a fine of not more than one thousand dollars, either or both. * * * "

Section 18.2-71, 1950 Code of Virginia, as amended:

"Producing abortion or miscarriage, etc.; penalty. - Except as provided in other sections of this article, if any person administer to, or cause to be taken by a woman, any drug or other thing, or use means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and thereby destroy such child, or produce such abortion or miscarriage, he shall be guilty of a Class 4 felony."

Section 18.2-72, 1950 Code of Virginia, as amended:

"When abortion lawful during first trimester of pregnancy. - Notwithstanding any of the provisions of §§ 18.2-71, it shall be lawful for any physician licensed by the Virginia State Board of Medicine to practice medicine and surgery, to terminate or attempt to terminate a human pregnancy or aid or assist in the termination of a human pregnancy by performing an abortion or causing a miscarriage on any woman during the first trimester of pregnancy."

Section 18.2-76, 1950 Code of Virginia, as amended:

"Informed consent required. - Before performing any abortion or inducing any miscarriage or terminating a pregnancy as provided for in §§ 18.2-72, 18.2-73 or 18.2-74 * * *

The physician shall inform the pregnant woman of the nature of the proposed procedure to be utilized and the risks, if any, in her particular case to her health in terminating or continuing the pregnancy."

Section 19.2-295, 1950 Code of Virginia, as amended:

"Ascertainment of punishment. - Within the limits prescribed by law, the term of confinement in the penitentiary or in jail and the amount of fine, if any, of a person convicted of a criminal offense, shall be ascertained by the jury, or by the court in cases tried without a jury."

APPENDIX C

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

COMMONWEALTH OF VIRGINIA

v. M-4789

LESZAK SYSKI

Defendant

MOTION IN LIMINE
TO EXCLUDE DEFENDANT'S EVIDENCE OF
FETAL LIFE AND THE DEFENSE OF NECESSITY

COMES NOW the Commonwealth, by its Attorney, and moves this Court to exclude evidence to be proffered by the defendants as to the existence and inception of fetal life, and the defense of necessity during the trial of the above styled matter now scheduled for trial on April 1, 1980, with a jury for the reasons hereinbelow set forth, to-wit:

1. The defendant, and others, were arrested and charged with trespassing in violation of §18.2-119, Code of Virginia (1950), as

amended, during an incident at the Alexandria Women's Clinic in Alexandria on September 15, 1979.

2. The Alexandria Women's Clinic is a medical facility providing a variety of gynocological services including, inter alia, first trimester abortions consistent with Virginia law.

3. The Commonwealth has reason to believe that the defendant will attempt to introduce evidence before the jury that human life begins at the moment of conception, and that the resultant fetus is a human being as a matter of scientific fact. Further, it is believed that the defendant will attempt to provide testimony, before the jury, of a physician, a clergyman, and a woman or women who are now or have been pregnant, and a demonstrative evidence consisting of magazine articles, photographs, motion pictures and photographic

slides, all for the purpose of showing that life begins at conception and that the fetus is a human being.

4. Because the United States Supreme Court has permitted first trimester abortions (See Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705 35 L. Ed. 2d 147 (1973) and Doe v. Bolton, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 201 (1973)) and the law of the Commonwealth permits such abortions (See §18.2-72, Code of Virginia (1950), as amended) the defense of necessity is not applicable.

5. Therefore, even if the defendant's beliefs regarding the inception of human life are true, they are nevertheless irrelevant as a matter of law in regard to this offense of trespass in violation of §18.2-119 Code of Virginia (1950), as amended. Consequently, the sole purpose and result of attempting to introduce the aforementioned evidence would

be to inflame the passions of the jury and distract the members of the jury from considering relevant evidence pertaining to the issues properly in controversy.

WHEREFORE, the Commonwealth prays that the said Motion be granted.

Respectfully submitted,

/s/ Richard S. Mendelson
Richard S. Mendelson
Assistant Commonwealth's Attorney

VIRGINIA

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

COMMONWEALTH OF VIRGINIA

v. M-4789

LESZAK SYSKI

Defendant

DEFENDANT'S OPPOSITION TO MOTION
TO EXCLUDE EVIDENCE

COMES NOW defendant, Leszak Syski, by counsel, and opposes the Commonwealth's motion to exclude evidence of fetal life and for reasons states as follows:

1. Evidence will be presented at the trial that the Alexandria Woman's Clinic is not performing abortions in the manner authorized by the Supreme Court in Roe v. Wade, 410 U.S. 113. Because fetal life is being destroyed in an unlawful manner, the defendant's alleged trespass is justified in an attempt to prevent an illegal act.

2. Specifically, the evidence will show that, in the Alexandria Clinic, there is no medical judgment to abort made by the attending physician in consultation with his patient. Such consultation between physician and patient is a specific requirement of Roe v. Wade, supra. In Roe v. Wade, the Court ruled that the right of privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The Court said at page 153

> * * "All these (psychological harm, and mental and physical health) are factors the woman and her responsible physician necessarily will consider in consultation." Emphasis added.

At page 163, the Court said

> "This means, on the other hand, that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may

be effectuated by an abortion free of interference by the State." Emphasis added.

Finally, the Court said that a physician meant "a physician currently licensed by the State". This, of course, does not mean a nurse consultant or anyone else delegated by a physician. The decision clearly means that the attending physician must consult with his patient before the abortion takes place.

3. The fact that lives are being taken in an unlawful manner justifies the defendant's actions even more than they would be justified if a routine surgical procedure was being done unlawfully.

WHEREFORE, defendant prays that the Commonwealth's motion to exclude evidence of fetal life be denied.

/s/ Joseph G. Hitselberger
Joseph G. Hitselberger
Attorney for Defendant

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